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No. 80-846

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JIM ROSE, WARDEN, *Petitioner,*

v.

NOAH HARRISON LUNDY, *Respondent.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a petition for relief under 28 U.S.C. Sec. 2254 should be dismissed, without prejudice, where the petition presents several claims for relief but where one or more of the claims have not been presented to the state courts thereby failing to satisfy the exhaustion requirements of 28 U.S.C. Sec. 2254(b).

2. Whether habeas corpus relief was properly granted to the respondent on the grounds of prosecutorial misconduct.

3. Whether habeas corpus relief was properly granted to the respondent on the grounds that the state trial court limited his cross-examination of the main witness concerning prior contradictory statements about her lack of chastity.

4. Whether the district court erred by granting habeas relief without ordering expansion of the record so as to include the entire state trial transcript.*

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*A list of all parties to the proceedings in the Court below is presented in petitioner's brief.

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The unreported and reported opinions below are presented in the joint appendix and cited in Brief of Petitioner.

JURISDICTION

Jurisdiction of this Court is based on the order of the Court granting the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit, entered February 23, 1981. Jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in the Brief of Petitioner.

STATEMENT OF THE CASE

Noah Lundy was convicted by a jury, contrary to his pleas, of rape and crime against nature and was sentenced to terms of 120 years and 15 years, respectively, in the Tennessee State Penitentiary. (J.A. 53). Lundy's convictions were affirmed by the Tennessee Court of Criminal Appeals on August 30, 1974; the Tennessee Supreme Court denied review on March 10, 1975. (J.A. 52). Lundy then petitioned the Knox County Criminal Court, Tennessee, for post-conviction relief which was denied, after an evidentiary hearing, on May 3, 1976. (J.A. 62). No appeal was taken.

Lundy then petitioned the United States District Court for the Middle District of Tennessee, Nashville Division, for a writ of habeas corpus under the provision of 28 U.S.C. Sec. 2254 and alleged four grounds for relief; (1) that he was denied his right of confrontation during cross-examination of the prosecutrix; (2) that he was denied his right to a fair trial because of a prejudicial remark made by the prosecuting attorney to the jury to the effect that Lundy had a violent character; (3) that he was deprived of his right to a fair trial when the prosecuting attorney commented, during closing argument, that the only proof before the jury was from the State's witnesses which was uncontradicted and unrebutted; and, (4) that the trial judge improperly instructed the jury that every witness is presumed to swear the truth. (J.A. 64).

The district court granted habeas relief to Lundy on March 21, 1979, which decision was affirmed by the United States Court of Appeals for the Sixth Circuit. (J.A. 95).

At Lundy's trial the alleged rape victim, Sharon Murphy, was cross-examined before the jury as follows, which is the subject of Lundy's first claim for habeas corpus relief:

Q. So you had had intercourse with boys during 1973, is that true or not true?

A. Just Aaron Miller

Q. And you had intercourse with Danny Nipper, a boy by the name of Danny Nipper, had you not?

A. Not in the year '73. That was the year before in '72.

Q. I believe you had intercourse with Aaron Miller ten to twenty times during this period, had you not?

A. I don't remember how many times.

Q. That's what you told me previously.

A. I don't remember.

Gen. Evans: Object to what he told her previously.

The Court: Very well. I sustain the objection. You may ask her questions, Mr. Workman, but, ladies and gentlemen of the jury, you will not consider for any purpose the comment of counsel. The duty of counsel is to ask the questions and let the witness answer them. All right.

Q. Miss Murphy, did you or did you not tell me on an occasion when I talked with you that you had had intercourse with Aaron Miller ten to twenty times.

A. I don't remember.

Gen. Evans: Your Honor, I want to object to that, because I consider the conversation he had with her — this young lady — completely improper. He didn't inform her who he was . . .

Mr. Workman: What?

Gen. Evans: . . . he didn't inform her who he was, he didn't inform her who he was, he didn't tell her she had a right to have counsel present, he didn't do anything. He got her down there . . .

Mr. Workman: (Inaudible)

Gen. Evans: She's telling the truth on the stand — and he got her down there, and now he's trying to make use of that conversation, which was completely improper, and I object to any reference to that conversation or any attempt to use it to impeach on cross-examination.

(J.A. 6-7)

The prosecutor's objection to cross-examination by defense counsel was sustained by the trial court upon the erroneous ground that defense counsel failed to properly identify himself to the witness during the interview.

The Court: Very well, gentlemen, the Court is not passing on the question of ethics, it is passing on the question of admissibility of evidence, particularly on an objection that has been raised to the question put to this witness whether she did or did not tell him a certain thing during a certain conversation. It appearing to the Court that the attorney did not identify himself as to the fact that he was representing the defendant in this case, he did not make this

identification to this witness prior to putting these questions to her, that is, did not make his representation known to her prior to the time of presenting these questions to her, the Court then sustains the objection. However, counsel will be allowed to ask her other questions. I'm not cutting you off, Mr. Workman. You may ask her other questions . . .

Mr. Workman: What if I asked her something she told me about?

The Court: This is during that conversation, sir. Since you did not identify yourself as the attorney for Mr. Lundy, you will not ask her about (53) what she may have told you in that. Now, you may ask her questions about such other — such information as you have. In other words, don't refer to the conversation, but you may ask her about her prior relationship with these other individuals. I'm not cutting you off . . .

Mr. Workman: For my own direction, Your Honor, what is the authority for such? In other words . . .

The Court: The Court has just ruled . . .

Mr. Workman: For my own direction, Your Honor, what — is there a case on that?

The Court: There is now.

(J.A., 13)

On direct appeal, the Tennessee Court of Criminal Appeals held such reasoning to be erroneous but, with no explanation of its conclusion, harmless error. (J.A., 60-61)

In support of a proffer of evidence the prosecuting attorney made the following remarks before the jury, which is the subject of Lundy's second claim for relief:

> Q. Tell the jury whether or not you ever witnessed any difficulties between your sister, while she was dating the defendant, and the defendant?
>
> Mr. Workman: Your Honor, I still don't see that the materiality of this as to . . .
>
> General Gill: I would think the defendant's violent nature would be material to this case in light of what the victim had testified to.
>
> Mr. Workman: Your Honor . . .
>
> General Gill: I assume they claim that he's not this kind of person, and we're trying to show that he is. That's materiality.
>
> Mr. Workman: Your Honor, if I may finish my statement, I don't see any materiality to this case. He's charged in this case with rape and crime against nature.
>
> General Evans: Are you finished now. I will explain, Your Honor. This young lady explained in detail that one of the reasons that she reacted the way she did was because of this advice she received from this young lady. I think it's proper to show why this young lady was given the advice she was.

(J.A., 17-18)

The trial court then excused the jury from the courtroom to determine the admissibility of such examination. (J.A. 18). The defendant's objection was sustained and

the jury thereafter was instructed to disregard the prosecutor's remark. The Tennessee Court of Criminal Appeals found the prosecutor's remark to have been error; but after reviewing the evidence found the error to have been harmless beyond a reasonable doubt. (J.A. 58). The district court found the remark to have been error especially when weighed with many other acts of prosecutorial misconduct. (J.A. 91, 93). The court of appeals affirmed and said that Lundy's second claim for relief amounted to a constitutional violation warranting federal habeas relief. (J.A. 96).

During closing arguments the prosecuting attorney, in rebutting the defense counsel's summation, made the following remarks which were the subject of Lundy's third claim for habeas corpus relief:

> Now, evidently, the defendant's theory of this case is that we are to believe the minor inconsistencies in the State's proof, and, of course, the State's proof is what we are considering. The only story we've heard about what happened from 8:15 of the night of March 16th until about 4:00 in the morning of March 17th came from the State's witnesses. And we're suppose (sic) to think it's important whether or not he was asleep when we got there, whether he was covered or not covered, when the clothes were taken off, whether she was or was not held on the bed, whether or not she was forced with his hands or just suggested that she drink whiskey, and whether or not at one time at some point she had her hands somewhere on his back.

(J.A. 27)

The court of appeals held that the district court did not grant relief on this claim because it had not been presented to the state courts. (J.A. 93, 95-6).

The trial judge instructed the jury as follows, which is the subject of Lundy's fourth claim for habeas corpus relief:

> The jurors are the exclusive judges of the facts and the credibility of the witnesses. You are the judges of the law under the direction of the court. If there are conflicts in the evidence, you must reconcile them, if you can, without hastily or rashly concluding that any witness has sworn falsely, for every witness is presumed to swear the truth.

(J.A. 31)

The court of appeals said that habeas relief was not granted for this claim because it was unexhausted. Lundy never objected to the instruction nor did he raise the issue on appeal.

SUMMARY OF ARGUMENT

I

There is no requirement that a Federal Court dismiss a petition for a Writ of Habeas Corpus which contains both exhausted and unexhausted claims.

Courts have repeatedly considered petitions with mixed claims, and the adoption of a hard and fast rule requiring the dismissal of such petitions would frustrate the purpose of the Writ, which is to provide a prompt and effective remedy for one who is unlawfully imprisoned.

See *Fay* v. *Noia*, 372 U.S. 391 (1963); *Price* v. *Johnston*, 334 U.S. 266 (1948). Nor would the adoption of such a rule serve either to ease the workload of the habeas courts or reduce the friction between the Federal and State Courts.

When a petitioner has presented two exhausted claims which both the District Court and the Circuit Court of Appeals have found meritorious, the presence of two unexhausted claims, which were so recognized by the lower Courts, do not call for dismissal of the petition.

II

The District Court properly granted habeas relief on the ground of prosecutorial misconduct. The District Court found that this issue had been presented to the State Courts and the exhaustion requirement had been met. The fact that each example of prosecutorial misconduct cited by the District Court had not been objected to at trial by Lundy's attorney, does not mean that the issue itself was not exhausted nor does it mean that the District Court could not consider these examples of misconduct in assessing the overall atmosphere of the trial.

III

The Trial Court's restriction of cross-examination of the State's chief witness was an unconstitutional deprivation of Lundy's Sixth Amendment right of confrontation. The jury was deprived of seeing and hearing the witness cross-examined concerning a prior statement she had made.

This was not harmless error, as had the credibility of this witness been successfully challenged before the jury, the outcome of the case could have differed greatly.

IV

The State did not request an evidentiary hearing in the District Court, nor did it request the Court to review any part of the record other than that filed by the State with its answer to the Petition for Writ of Habeas Corpus.

The Petition raised no issues of fact, only issues of law, obviating the necessity for an evidentiary hearing in the District Court.

ARGUMENT

I.

When A Petition For A Writ Of Habeas Corpus Under 28 U.S.C. 2254 Contains Both Exhausted And Unexhausted Claims For Relief, The Court Should Consider The Exhausted Claims While Dismissing The Unexhausted Claims.

There is no requirement under 28 U.S.C. 2254 that a Federal Court dismiss a petition for a Writ of Habeas Corpus which contains both exhausted and unexhausted claims for habeas relief. 28 U.S.C. 2254(c) provides that the petitioner "shall not have been deemed to have exhausted the remedies available in the Courts of the State . . . if he has the right under the law of the state to raise . . . the question presented." Thus, by the very language of the code section, the exhaustion requirement is applied, not to a petition *in toto,* but to each question presented in the petition.

A. The Exhaustion Doctrine Is One Of Discretion, And A Hard And Fast Rule Dismissing Mixed Petitions Would Frustrate That Doctrine.

The Exhaustion Doctrine permits the Federal Courts to orchestrate the timing of their review out of respect for State Courts. The demand for a rigid rule that always dismisses mixed petitions is inconsistent with that very reasoned approach. It is a misguided attempt to avoid the sort of judgment the doctrine calls for.

The majority of the Federal Circuit Courts of Appeals have held that claims in a petition of Writ of Habeas Corpus which meet the exhaustion requirement can be considered by the Court, even though other claims in the petition do not meet the exhaustion requirement. *Johnson* v. *U.S.D.C.*, 519 F.2d 738 (8th Cir. 1975); *Tyler* v. *Swenson*, 483 F.2d 611 (8th Cir. 1973); *U.S. ex rel Levy* v. *McMann*, 394 F.2d 402 (2nd Cir. 1968); *Cameron* v. *Fastoff*, 543 F.2d 971 (2nd Cir. 1976); *Hewett* v. *North Carolina*, 415 F.2d 1316 (4th Cir. 1969); *United States ex rel Langer* v. *Ragen*, 237 F.2d 827 (7th Cir. 1956); *Miller* v. *Hall*, 536 F.2d 967 (1st Cir. 1976); *United States ex rel Richardson* v. *Rundle*, 461 F.2d 860 (3rd Cir. 1972); *United States ex rel Trantino* v. *Hatrack*, 563 F.2d 86, cert. den. 435 U.S. 928 (3rd Cir. 1977); *Whitely* v. *Meacham*, 416 F.2d 36 (10th Cir. 1969); *Meeks* v. *Jago*, 548 F.2d 134 (6th Cir. 1976).

The Supreme Court has followed the procedure of considering the merits of exhausted claims while simultaneously refusing to consider unexhausted claims. *Gooding* v. *Wilson*, 405 U.S. 518 (1972); *Francisco* v. *Gathright*, 419 U.S. 59, 63-64 (1974).

The Writ of Habeas Corpus is "the fundamental instrument for safeguarding individual freedom." *Harris* v. *Nelson*, 394 U.S. 286, 291 (1969). It was intended to provide a prompt and effective remedy when one was imprisoned unlawfully which would not become bogged down in a procedural morass. See *Fay* v. *Noia*, 372 U.S. 391 (1963); *Price* v. *Johnston*, 334 U.S. 266 (1948).

Petitioner now asks this Court to adopt a hard and fast rule that would require dismissal of petitions for habeas relief which contain a mixture of exhausted and unexhausted claims for relief and cites cases from the Fifth and Ninth Circuit Courts of Appeals in support of his position.[1] Petitioner asks the Court to use this hard and fast rule to replace the balancing of interests and appraisal of facts in each particular case that has always been demanded ever since *Ex parte Royall*, 117 U.S. 241 (1886).

B. The Exhaustion Doctrine Calls For A Balancing Of Competing Interests — Those Of The Petitioner, The State, And The Courts.

When a Court is presented with a Petition for a Writ of Habeas Corpus, it must balance the competing interests of the petitioner — prompt release from illegal confinement and preservation of his unexhausted claims; of the State — comity; and of the Courts — efficiency. By ruling on the exhausted claims and dismissing the unexhausted claims without prejudice, the petitioner's interests are protected whether or not the Court finds merit in the considered claims. The State's interest is protected, as it

[1] See *Galtieri* v. *Wainwright*, 582 F.2d 348 (5th Cir. 1978) en banc and *Gonzales* v. *Stone*, 546 F.2d 807 (9th Cir. 1976).

will have already ruled on the exhausted claims. The Court's interest is protected by disposing of the exhausted claims — they will not be left in a limbo while the State Courts consider the dismissed unexhausted claims, perhaps to no avail if there is merit in one of the exhausted claims. See *Habeas Petitions with Exhausted and Unexhausted Claims,* 57 B. U. L. Rev. 464 (1977).

The adoption of the hard and fast rule urged by petitioner would neither ease the burden on the Courts nor would it reduce friction between the State and Federal Court systems. Under such a rule, when the Federal District Court, in reviewing the Habeas Petitioner's claims, came across an unexhausted claim, it would have to dismiss the petition without prejudice, even though the Court might have already reviewed one or more meritorious claims. Then the State court would be presented with the unexhausted claims to review, which review would be a useless waste of the Court's time, as the Federal Court, upon getting the case the second time would award relief on the exhausted claims it had previously considered and found to have merit. When the case came back the second time, the Federal court would again have to read the record and documents accompanying the case. Now more time would have elapsed, the record would be more stale, and the State would have a more difficult time if it were ordered to retry the habeas petitioner.

It is perhaps for these reasons that even *Galtieri* and Gonzales do not support petitioner's stand for an unyielding rule:

> "In some circumstances, however, it is proper for Federal Courts to treat claims technically unex-

> hausted. As the Supreme Court stated in *Fay* v. *Noia,* 'The rule of exhaustion is not one defining power but one which relates to the appropriate exercize of power'." *Galtieri* v. *Wainwright,* 582 F.2d 348,354 (5th Cir. 1978).
>
> This rule is not inflexible, however. *Gonzales* v. *Stone,* 546 F.2d 807,810 (9th Cir. 1976).

Judge Hill, in his concurring opinion in *Galtieri* put the holding of that case into perspective:

> . . . both authors (of other opinions in the case) contemplate that occasions will arise when a district judge will find in a mixed petition an exhausted ground which ought to be addressed without the delay that would be occasioned by deferring the matter until other grounds had been taken through the state system. That is as it should be. *Galtieri,* Supra at 365.

Because all of the claims in this case did not meet the exhaustion requirement does not mean that the claims properly pursued should be dismissed. There is no interest of the State that overrides the need for a proper remedy for the violation of Lundy's constitutional rights. Courts have addressed this question and resolved the conflict between the exhaustion requirement and a remedy for violation of constitutional rights:

> We recognize . . . the desirability, where circumstances permit, of including all grounds for habeas in a single petition. But we think this does not outweigh the legitimate interest of a prisoner in obtaining prompt federal consideration of an adequate and properly asserted ground for relief that has been urged unsuccessfully before the state courts. *U.S. ex rel Boyance* v. *Myers,* 372 F.2d 111 (3rd Cir. 1967).

> However, where the unexhausted claims are either unrelated to the principal exhausted claim or frivolous, the desirability of including all grounds for habeas corpus in a single petition does not outweigh the interests of a prisoner in obtaining prompt federal consideration of exhausted claims. *U.S. ex rel Levy* v. *McMann,* 394 F.2d 402 (2nd Cir. 1968).

In this case, the grounds asserted in claims one and two are clearly distinct from those asserted in claims three and four.

The priorities of the interests which must be balanced in this type of situation were perhaps most clearly pointed out by this Court:

> The doctrine of exhaustion of state remedies as a pre-requisite to federal habeas corpus action is a judicially crafted instrument which reflects a useful balance between important interests of federalism and the need to preserve the Writ of Habeas Corpus as a swift and imperative remedy in all cases of illegal restraint or confinement. This doctrine cannot be used as a blunderbuss to shatter the attempt at litigation of constitutional claims without regard to the purposes which underlie the doctrine and which called it into existence. *Braden* v. *30th Judicial Circuit,* 410 U.S. 484,490 (1973).

To hold that the District Court could not consider the exhausted claims which addressed Lundy's deprival of a fair trial because two separate claims had not been exhausted would indeed be an indiscriminate firing of the blunderbuss.

Petitioner states that adoption of a rule requiring the dismissal of petitions containing mixed claims is neces-

sary to insure the prompt handling of the claims in the Federal Courts with one hearing and to prevent the prisoners from "sand bagging" in the State Courts by holding back on some claims and preserving them for consideration at a later date by the Federal Courts in the event that their first claims are dismissed.

Lundy's petition was filed on a "form for use in applications for habeas corpus under 28 U.S.C. 2254" which states in its instructions, "your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction" (J.A. 64,66). In the body of the form there is a cautionary instruction telling the petitioner that in order to proceed to the Federal Court he must ordinarily exhaust his State Court remedies as to each ground on which he requests action by the Federal Court. It further instructs him that all grounds on which he has previously exhausted State Court remedies must be set forth in the petition if he wishes Federal relief. (J.A., 69). No where in this form does it state that the petitioner will have his exhausted claims dismissed if he sets forth any unexhausted claims in the petition. The question would arise as to whom is being sandbagged.

Petitioner would have us believe that lurking behind the prison walls are a group of people who are well enough schooled in the law and the procedures thereunder that they can carefully orchestrate the successive presentment of claims for relief to a Federal Court in such a manner that they will always have some

in reserve in case their forefront claims are denied. It is a more realistic scenario to picture in that situation a group of people unschooled in the law, unfamiliar with anything remotely connected to "the exhaustion doctrine" and who are appealing to the Courts for relief from constitutional violations as they become aware after the fact that these violations have taken place.

> . . . the exhaustion requirement is often not understood by the unrepresented petitioner. The Attorney General has both the legal expertise and access to the record and thus is in a much better position to inform the Court on the matter of exhaustion of State remedies. 28 U.S.C. Sec. 2254 Rules, Rule 5, *Notes of Advisory Committee on Rules.*

C. If A District Court Has Reached The Merits Of A Mixed Petition, A Reviewing Court Should Review The Merits Of The Claim.

At this point, both the District Court and the Sixth Circuit Court of Appeals have found constitutional error in claims which Lundy has presented to the State Courts. To require dismissal of the petition and return to the State Courts for consideration of the unexhausted claims would mean that the State Courts would have to consider and rule upon claims that have no bearing on the ultimate outcome of the case. This will gain nothing for the State Courts nor will it reduce the friction between the two Court systems.

The Court's holding in *Galtieri* v. *Wainwright*, 582 F.2d 348 (5th Cir. 1978) that if a District Court reaches the merits of the claim and an appeal is taken from its dispositional order, the Court of Appeals should review the merits of the claim, only weakens petitioner's argument

that the case supports his request for a hard and fast rule requiring dismissal of mixed petitions.

II.
The District Court Properly Granted Habeas Relief On The Grounds Of Prosecutorial Misconduct.

In his petition for Writ of Habeas Corpus, Lundy alleged as his second ground for relief that his constitutional rights had been violated by the prejudicial conduct of the Assistant Attorneys General and referred specifically to the comment of the prosecution about Lundy's "violent nature". (J.A., 72). The issue of prosecutorial misconduct had been raised and considered in the State Court of Appeals and found to be harmless error, even though "in a different case (it) could constitute prejudicial error." (J.A., 58).

The District Court properly held that the issue of prosecutorial misconduct had been presented to the State Courts and that the Exhaustion requirement had been met. It further held that the petitioner was not given a fair trial, and one of the reasons was the "flagrant prosecutorial misconduct." (J.A., 94).

The State argues that the District Court was without jurisdiction to grant relief for fourteen of the nineteen instances of prosecutorial misconduct cited in its opinion because Lundy neither objected at trial to the fourteen instances nor did he raise those issues before the State's Appellate Court, and that his failure to do so constituted a waiver of any objection to those acts. However, the

Court of Appeals found that this argument was without merit, that the cause and prejudice rule of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977) did not apply as the Tennessee Courts had considered the issue of prosecutorial misconduct on the merits. (J.A., 96).

The issue is not how many instances of misconduct existed and to how many objections were lodged, but whether there was misconduct and whether the issue was preserved. It was raised and the misconduct was established and recognized by the Court of Criminal Appeals of Tennessee. The District Court in considering this claim for relief had a duty to review the record closely to find if Lundy's claim was supported by the record. The Court was considering a petition filed *pro se* by one not trained in the law on a preprinted form, which advised him to "tell your story briefly without citing cases or law." (J.A., 71). The Court discharged this duty by referring to "a substantial amount of testimony." (J.A., 89).

Petitioner argues that the District Court erroneously granted habeas relief for acts of prosecutorial misconduct which were barred because of Lundy's failure to timely object thereto or to present them in State Courts. However, this argument fails for the reason that the District Court did not grant habeas relief for each and every act of prosecutorial misconduct referred to in its opinion. The Court took great pains to point out that it would refer to the unexhausted claims and the examples thereof only collaterally in assessing the atmosphere of the trial as a whole. The District Court found that there was prosecutorial misconduct that deprived Lundy of a fair trial.

To hold that the Court in assessing the prosecutorial misconduct could look only at those instances where objections were lodged or which had been pointed out in Lundy's earlier appeals would be to ask the Court to put on blinders and ignore the overall atmosphere of the trial. Merely because the Court referred to instances of misconduct does not mean that the relief was granted for each and every act.

The Court granted relief on the grounds of prosecutorial misconduct because of the improper remark of the Assistant Attorney General concerning Lundy's "violent nature" and for his remarks concerning the actions of Lundy's defense counsel which were made in the presence of the jury. In reaching a decision as to whether the errors were harmless, the Court had no other choice than to examine the other improprieties of the Assistant Attorney General.

Petitioner argues that there were factual findings made by the State Court of appeals which were entitled to deference by reason of 28 U.S.C. 2254(d). See *Sumner* v. *Mata*, ____ U.S. ____, 101 S.Ct. 764 (1981). However, *Sumner* does not apply in this case because the District Court did not find evidentiary facts different from those found by the State Court, and the presumption of correctness afforded by 2254(d) does not extend to conclusions of law or determination of mixed questions. *Cuyler* v. *Sullivan*, 446 U.S. 335 (1980). What the District Court did find was that the error which the State Court of Criminal Appeals found harmless was in fact not harmless.

III

Lundy Was Deprived Of His Sixth Amendment Right Of Confrontation By The Court's Restriction Of Cross-Examination Of A Witness.

Lundy was deprived of his Sixth Amendment Right of Confrontation by the refusal of the Trial Court to permit his attorney to cross-examine the state's chief witness concerning a conversation with the attorney at his office prior to trial. The Court's reason was that the attorney did not identify himself as the representative of the defendant prior to the conversation. (J.A., 13).

The denial of reasonable latitude in cross-examination is prejudicial error and it is not necessary to show that the cross-examination, if preserved, would necessarily have brought out facts tending to discredit the testimony in chief. *Alford* v. *U.S.*, 282 U.S. 687 (1931).

The right of confrontation and cross-examination is a fundamental requirement of a constitutionally fair Trial, and denial of that right is a constitutional error so great that no amount of showing of want of prejudice can cure. *Pointer* v. *Texas*, 380 U.S. 400 (1965); *Davis* v. *Alaska*, 415 U.S. 308 (1974); *Parker* v. *Gladden*, 385 U.S. 363 (1966); *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *Brookhart* v. *Janis*, 384 U.S. 1 (1966); *Smith* v. *Illinois*, 390 U.S. 129 (1968).

There was a hearing on this issue conducted out of the presence of the jury. However, such a hearing would have no bearing on this issue, as the right to confront witnesses is a Trial Right, and includes both the opportunity to cross-examine and the occasion for the jury to weigh

the demeanor of the witness. *Barber* v. *Page*, 390 U.S. 719 (1968); *Mancusi* v. *Stubbs*, 408 U.S. 204 (1972); *Berger* v. *California*, 393 U.S. 314 (1969).

The jury in this case was denied the opportunity to hear the witness cross-examined on her prior statement and to observe her demeanor when confronted with those statements. That witness whose cross-examination was erroneously restricted by the Trial Court's ruling was the alleged victim of the offenses and the State's chief witness. Had her credibility been successfully challenged on the issue of voluntariness, the outcome of the case might have differed greatly. "Where a criminal case may stand or fall on the jury's belief of one witness, his credibility is subject to close scrutiny." *Gordon* v. *U.S.*, 344 U.S. 414 (1953).

Had the complaining witness's testimony been successfully challenged and discredited by cross-examination, the State would have been left with the testimony of Lundy's one-time girlfriend, which certainly could not be construed as so overwhelming as to render the denial of cross-examination to be harmless error.

Petitioner urges that the District Court rejected the State Court's factual finding of harmless error without explanation. However, once again, as with the issue of prosecutorial misconduct, the District Court merely arrived at a different conclusion from the same facts, namely, that the restriction on cross-examination rose above the level of harmless error. This Court has held that constitutional errors affecting the substantial rights of the aggrieved party could not be considered to be

harmless. *Chapman* v. *California,* 386 U.S. 18 (1967); *Harrington* v. *California,* 395 U.S. 250 (1969).

Petitioner argues that there was no denial of confrontation because Lundy was bound to the answer given on cross-examination of the witness on the collateral matter of impeachment. It is a well stated rule that a witness may be cross-examined on prior statements which are inconsistent with testimony given on the stand. 98 C.J.S. *Witnesses,* Section 401. In the Tennessee case cited to support Petitioner's position the question objected to was asked on direct examination of the witness, not on cross-examination.[2]

As to the argument that Lundy was stuck with the witness's answer, which Petitioner erroneously terms a denial of making the statement:

> Q. Miss Murphy, did you or did you not tell me on an occasion when I talked with you that you had intercourse with Aaron Miller ten to twenty times?
>
> A. I don't remember. (J.A., 7)

Petitioner states that the State's objection to this question was overruled. However, an examination of the record shows that the objection was sustained. (J.A., 13). Thus, there was no answer given to the question for purposes of the record, the jury being presumed to follow the instruction to disregard the answer when an objection is sustained.

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[2] *McGowen* v. *State,* 221 Tenn 442, 427 SW2d 555 (1968).

There can be no justification for the limitation of Lundy's right to cross-examine on the prior statement. This issue alone supports the grant of the Writ of Habeas Corpus by the District Court.

IV.
The State Requested No Evidentiary Hearing In The District Court Nor Was There Need For One.

The State filed an Answer to Lundy's *pro se* Petition for Writ of Habeas Corpus and attached thereto "pertinent portions of the transcripts." (J.A., 79). Neither an evidentiary hearing nor expansion of the record beyond that submitted by the State was requested, either before or after the District Court rendered its decision granting the Writ. Only after the State attempted to insert the balance of the Trial Transcript in the appendix of its brief in the Court of Appeals, resulting in its brief and appendix being struck, did the State move the Circuit Court to include the entire State transcript in its appendix, which motion was denied. (J.A., 2).

This Court has addressed the necessity for evidentiary hearings in this type of case:

> Where the facts are in dispute, the Federal Court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair hearing in a State Court . . . *Townsend* v. *Sain,* 372 U.S. 293, 312 (1963).

Since the function of an evidentiary hearing is to try issues of fact, such a hearing is unnecessary when only issues of law are raised. *Yeaman* v. *U.S.,* 326 F.2d 293 (9th Cir. 1963). Lundy's petition in the District Court pre-

sented no issue of fact; it addressed four questions of law. Therefore, a hearing was unnecessary.

In a habeas proceeding the respondent is required to furnish the portion of the transcript which he deems relevant. *Rules Governing Section 2254 cases, Rule 5.* 28 U.S.C. foll. Section 2254. Petitioner evidently at one time felt the balance of the transcript unnecessary for the consideration of the District Court in its review of Lundy's petition. Having failed to raise that issue as error in the Court of Appeals, he cannot now be heard to complain of an incomplete transcript, particularly when he states to this Court that the District Court had a thorough recitation of the evidence and did not need to consider the entire State transcript.

CONCLUSION

For the above reasons, Respondent requests the Court to affirm the decision of the lower Court.

Respectfully submitted,

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